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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO GUTIERREZ,

Defendant and Appellant.

G057594

(Super. Ct. No. 98NF2685)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger. Affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Alan L. Amann, Deputy Attorney General, for Plaintiff and Respondent.

We appointed counsel to represent Marcus Antonio Gutierrez on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against his client but advised the court he found no issues to argue on Gutierrez's behalf.

Counsel filed a brief following the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). The court in *Wende* explained a *Wende* brief is one that sets forth a summary of proceedings and facts but raises no specific issues. Under these circumstances, the court must conduct an independent review of the entire record. When the appellant himself raises specific issues in a *Wende* proceeding, we must expressly address them in our opinion and explain why they fail. (*People v. Kelly* (2006) 40 Cal.4th 106, 110, 120, 124.)

Counsel did not provide the court with any information as to issues that might arguably support an appeal pursuant to *Anders v. California* (1967) 386 U.S. 738. We gave Gutierrez 30 days to file written argument on his own behalf, which he did. In his 36-page supplemental brief, Gutierrez submits seven pages from counsel's *Wende* brief, four pages of information concerning habeas corpus legislation, and multiple pages of citations to case law regarding habeas corpus issues.

Upon our independent review of the record, we identified an issue which may, if resolved favorably to Gutierrez, result in reversal of the judgment. Penal Code section 1170.95, subdivision (c) (all further statutory references are to the Penal Code) states, in relevant part, "If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." Here, Gutierrez requested counsel, but the trial court failed to appoint counsel.

We invited the parties to file supplemental letter briefs on the following issue: Did the trial court err by failing to appoint counsel after Gutierrez requested the court appoint counsel for him during the resentencing process?

We have reviewed the record in accordance with our obligations under *Wende*, and considered the information Gutierrez provided. We conclude Gutierrez was not entitled to counsel and we found no other arguable issues on appeal. We affirm the judgment.

FACTS

In February 1999, an information charged Gutierrez with willful, deliberate, and premeditated attempted murder (§§ 664, 187, subd. (a)) (count 1), and assault with a deadly weapon and by means of force likely to produce great bodily injury (former § 245, subd. (a)(1)) (count 2). The information alleged he personally used a dangerous and deadly weapon during the attempted murder (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury during both counts (§ 12022.7). It also alleged he suffered five prior prison terms (§ 667.5, subd. (b)), one prior serious felony (§ 667, subd. (a)(1)), and one prior serious or violent felony (§§ 667, subds. (d), (e)(2), 1170.12, subds. (b), (c)(2)).

A jury convicted Gutierrez of count 1 and found the enhancement allegations true. The jury found him not guilty of count 2. At a bifurcated trial, the court found the prior conviction allegations true. The court sentenced Gutierrez to life in prison, with a minimum of 14 years, for his conviction on count 1. The court imposed a determinate term of 12 years as follows: three years for the great bodily injury enhancement, five years for the prior serious felony enhancement, and one year each for four of the prior prison term enhancements. The court stayed the sentences on the remaining prior prison term enhancement and the deadly weapon use enhancement. We affirmed in *People v. Gutierrez* (Jan. 16, 2002, G025769) [nonpub. opn.].

In January 2019, Gutierrez filed a petition for resentencing pursuant to section 1170.95. In the petition Gutierrez indicated, “I request that this court appoint

counsel for me during this re-sentencing process.” The trial court did not appoint counsel and denied the petition. The court found Gutierrez had not made a prima facie case for relief. The minute order reflecting the court’s ruling appears to be a standardized minute order that includes two different bases for denial. The minute order stated the following: “The petition does not set forth a prima facie case for relief under the statute. A review of court records indicates [Gutierrez] is not eligible for relief under the statute because [Gutierrez] does not stand convicted of murder or [Gutierrez’s] murder conviction(s) is not based on felony-murder or on a natural and probable consequences theory of vicarious liability for aiders and abettors.” Gutierrez filed a timely notice of appeal of the denial of his section 1170.95 petition.

DISCUSSION

I. Section 1170.95

Section 1170.95, subdivision (a), provides, in relevant part, “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts” The new statute, enacted as part of Senate Bill 1437 (S.B. 1437), modified the law relating to accomplice liability for murder but does not mention the crime of attempted murder.

Arguments have been made that the statute should be expanded beyond its wording to include attempted murder, but we are not persuaded. Our colleagues in the Second District recently addressed this issue in *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), review granted November 13, 2019, S258175 (Cal. Rules of Court, rule 8.1115(e)(1) [while review pending may rely on for persuasive value]). The *Lopez* court concluded SB 1437 excluded any relief for individuals convicted of attempted murder. (*Lopez, supra*, 38 Cal.App.5th at p. 1104.) It noted this conclusion was supported by SB 1437’s plain language and legislative history. (*Lopez, supra*, 38 Cal.App.5th at

p. 1105.) In citing SB 1437's repeated use of the term "murder" and the absence of the use of the term "attempted murder," the court concluded the Legislature's intention to limit relief to those convicted of the completed crime of murder was clear. (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) We find the *Lopez* court's reasoning persuasive and conclude S.B. 1437 does not apply to attempted murder, the crime of which Gutierrez stands convicted.

We now turn to the issue of appointment of counsel. Section 1170.95, subdivision (c), provides in relevant part the following: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner."

Here, the minute order was not specific, but we infer the trial court found Gutierrez was statutorily ineligible for relief because he was not convicted of murder. Such a finding was based on a simple application of the statute. Gutierrez was not entitled to S.B. 1437 relief because he was not convicted of murder, and the trial court could summarily deny his petition based on a preliminary review of the charges. Any error in not appointing counsel was harmless beyond a reasonable doubt because Gutierrez could not make an arguable showing as a matter of law. Under the circumstances of this case, appointment of counsel was not required.

II. Gutierrez's Supplemental Brief

Although Gutierrez includes pages from his counsel's *Wende* brief, his supplemental brief appears to be an effort to obtain habeas corpus relief. We conclude this because of his references to section 1473, which provides reasons why a writ of habeas corpus may be prosecuted. Those reasons include the submission of false evidence (§ 1473, subd. (b)(1)) and the discovery of new evidence (§ 1473, subd. (b)(3)). Gutierrez's multiple pages of legal citations relating to factual or actual innocence,

miscarriage of justice, the presentation of false evidence, and the failure to disclose exculpatory evidence, also support our conclusion. He additionally includes a “Letter of Declaration” in which he asserts his factual innocence. The submission of all this information supports our conclusion Gutierrez is seeking habeas corpus relief. It is not relevant to the appeal of the denial of his section 1170.95 petition.

Any arguments as to why he is entitled to habeas corpus relief are not properly before this court because Gutierrez’s appeal was from the denial of his section 1170.95 petition. “Our jurisdiction on appeal is limited in scope to the notice of appeal and the judgment or order appealed from.” (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436.) Accordingly, we do not address the merits of Gutierrez’s arguments in support of habeas corpus relief.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.